IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

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EMIL J. SONDERLICK,
Plaintiff-Petitioner,

against

THOMAS H. SIMMONS, *et al.*,
Defendants,

THOMAS J. HALLINAN,
Defendant-Respondent.

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BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No opinion was rendered by any of the courts below.

Jurisdiction.

The judgment of the Appellate Division of the Supreme Court of the State of New York, First Department, now sought to be reviewed, was entered on February 18th, 1944. On March 24th, 1944, the same Court denied petitioner's motion for permission to appeal to the Court of Appeals of the State of New York. The Court of Appeals denied like permission on May 25th, 1944. On August 25th, 1944, Mr. Justice Jackson, of the Supreme Court of the United States, signed an order extending petitioner's time to apply for certiorari to and including September 25th, 1944.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended, 28 U. S. C., Section 344 (b).

Petitioner seasonably and at the outset raised the constitutional question (fols. 223-224, 248-249), urging that the determinations involved were depriving him of property without due process of law, in contravention of the provisions of the Constitution of the United States.

Statement of the Case.

A summary statement of the case is set forth in the petition.

Specification of Errors to be Urged.

It is intended by petitioner to urge as errors, unless limited by this Court, all of the matters set forth in the petition as reasons for the allowance of the writ.

Argument.

1. *The order purporting to appoint Hallinan receiver of petitioner's property was null and void.*

As the Supreme Court, Queens County, had no jurisdiction of either petitioner or of his said real property, the order purporting to appoint Hallinan receiver was altogether a nullity. Clark on Receivers, page 414; High on Receivers, 4th edition, page 57.

The order is also void because no notice of the appointment was given to petitioner as the owner of the said property. 53 Corpus Juris 59; *Brooklyn Empire Construction Co.* v. *Cinak Realty Corp.*, 226 App. Div. 809.

The order was contrary to the law of the case inasmuch as the Court had vacated the *lis pendens* on October 2, 1939. The order was also violative of section 121 of the New York Civil Practice Act.

2. *The validity of the receivership being challenged by a plenary action of ejectment, petitioner is entitled to a trial of his accrued causes of action against Hallinan.*

As the Supreme Court, Queens County, was without jurisdiction to make the appointment, the order of appointment may be attacked at any time, in all forms and by all persons. Alderson on Receivers, 2nd edition, page 178; Clark on Receivers, *supra*; High on Receivers, *supra.*

It is proper to sue Hallinan individually for his wrongful entry and possession of petitioner's real property. Wait's New York Practice, 4th edition, volume 11, page 741; High on Receivers, 4th edition, page 55; *Fallon* v. *Egberts Woolen Mills Co.*, 56 App. Div. 585, 67 N. Y. Supp. 347, 348.

3. *Summary judgment was improper as there are issues to be tried before a jury.*

Dwan v. *Massarene*, 199 App. Div. 872.

4. *The dismissal of petitioner's ejectment action without a trial and on the basis of an alleged adjudication in an action to which he was neither party nor privy was a deprivation of property without due process of law, in violation of the Constitution of the United States, Amendment XIV.*

The validity of petitioner's contention in this regard is unassailable. The case is governed by the controlling decision of this Court in *Postal Telegraph-Cable Co.* v. *Newport*, 247 U. S. 464, 62 L. Ed. 1215, where Mr. Justice Pitney wrote, for the unanimous Court (citing many authorities):

> "The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some

other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction * * *. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings * * *. And as a state may not, consistently with the 14th Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard * * *, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein."

The application of these principles compels the conclusion that petitioner was deprived of his constitutional rights.

Conclusion.

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for the writ of certiorari should be granted.

Respectfully submitted,

EMIL J. SONDERLICK,
Petitioner,

By JACOB W. FRIEDMAN,
Attorney for Petitioner.